



1 FINANCE AND ADMINISTRATION CABINET

2 Department of Revenue

3 (Amendment)

4 103 KAR 26:120. Advertising agencies.

5 RELATES TO: KRS 139.010, [~~139.050, 139.100, 139.110, 139.120, 139.140,~~] 139.200, 139.260,
6 139.270, 139.280, 139.310, 139.330

7 STATUTORY AUTHORITY: KRS 131.130, 139.710

8 NECESSITY, FUNCTION, AND CONFORMITY: KRS 131.130 and 139.710 authorize the
9 Department of Revenue[~~Revenue Cabinet~~] to promulgate administrative regulations for the assessment,
10 collection, refunding, administration, and enforcement of the Kentucky tax laws. This administrative
11 regulation establishes requirements and guidelines for the application of sales and use tax to purchases and
12 sales of tangible personal property and digital property by advertising agencies.

13 Section 1. Definitions. (1) "Advertising agency" means a business engaged primarily in the professional
14 service of developing strategy, concept, and design for the placement of advertising on radio or television
15 stations, or in newspapers, magazines, or other media.

16 (2) "Advertising services" means all advertising agency activities involved in the conceptualization,
17 development, production, and refinement of a master advertisement prior to its reproduction by the
18 advertising agency or a third party including creative concept development, design, layout, consultation
19 services, research, script and copy writing, art preparation, public relations, and account management
20 services.

21 (3) "Master advertisement" means the original advertising material created by the advertising agency
22 for reproduction as tangible personal property or digital property [~~in tangible form~~] for the purpose of

display or other advertising uses, such as master commercials, camera ready art, proofs, and corporate logos.

Section 2. Advertising Agencies as Consumers in Creation of Master Advertisement. (1) An advertising agency shall be the consumer of all the tangible personal property and digital property used in the performance of its advertising services to produce a master advertisement regardless of whether the property the agency purchases is acquired in the name or account of the advertising agency or its client.

The tax shall apply to the advertising agency's purchase of:

(a) All tangible personal property or digital property for use in the performance of its advertising services, including the purchase or rental of stock photos and movie footage delivered as tangible personal property or digital property;

(b) Any materials that become a component of the master advertisement; and

(c) Any tangible personal property or digital property that is incidentally provided to the client as part of the advertising services.

(2) An advertising agency shall not claim that its purchase of tangible personal property or digital property is exempt from sales and use tax because the property is to be used in fulfilling a contract with:

(a) The federal government, state government, or political subdivision thereof;

(b) Any department, agency, or instrumentality of the federal government, state government or political subdivision thereof; or

(c) A religious, educational, or charitable institution exempt from tax under KRS 139.495.

(3) The performance of advertising services shall not constitute manufacturing or processing production

of tangible personal property for sale. Therefore, an advertising agency shall not claim that its purchase of tangible personal property used in the performance of its advertising services is exempt from sales and use tax under the:

(a) Raw material, industrial tool, and industrial supply exemption as provided in KRS 139.470(10); ~~[139.470(11);]~~ or

(b) The machinery for new and expanded industry exemption as provided in KRS 139.480(10).

(4) If acting in the capacity of a consumer, an advertising agency shall not bill its client for tax on charges made for advertising services.

Section 3. Advertising Agencies as Retailers After Creation of Master Advertisement. (1) An advertising agency shall be a retailer of tangible personal property and digital property the advertising agency sells to its clients or to others on behalf of its clients regardless of whether the sale is at a marked-up price. This provision shall include property reproduced from a master advertisement whether the advertising agency or a third party actually reproduces the materials. This provision shall not include property described in Section 2 of this administrative regulation that the advertising agency uses in creating a master advertisement.

(2) An advertising agency engaged in business as a retailer shall:

(a) Complete a "Kentucky Tax Registration Application", [~~October 2002~~]-Revenue Form 10A100, to register with the Department of Revenue[~~Revenue Cabinet~~] for a retail sales and use tax permit; and

(b) Report and pay the applicable tax derived from gross receipts utilizing Revenue Form 51A102, "Sales and Use Tax Return"[~~, (July 2003)~~].

(3) Taxable receipts from an advertising agency's retail sale of tangible personal property and digital property shall include all charges for services that are a part of the sale of tangible personal property and digital property including charges for:

(a) Inbound freight;

(b) Production supervision; or

(c) Print management that directly relate to the sale of particular tangible personal property.

(4) Gross receipts subject to sales tax shall not include periodic print management fees or other retainer fees not related to the sale of particular tangible property and paid whether or not there is a transfer of tangible property in a given fee period.

(5) An advertising agency may purchase tangible personal property and digital property it sells to or for its clients as a sale for resale without payment of the tax if the advertising agency provides to its suppliers a properly completed:

1 (a) Kentucky "Resale Certificate" [~~(September 1990)~~], (Revenue Form 51A105);

2 (b) Multistate Tax Commission (Uniform Sales and Use Tax Certificate Multijurisdiction); [~~or~~]

3 (c) Streamlined Sales and Use Tax Agreement – Certificate of Exemption (Revenue Form 51A260); or

4 (d) [(e)] Other documentation containing the information required by KRS 139.280.

5 Section 4. Joint Activities by Advertising Agencies. (1) If an advertising agency contracts with a client
6 to provide both advertising services and the sale of tangible personal property or digital property, receipts
7 subject to tax shall be determined by the following guidelines provided the charges for the advertising
8 services are clearly delineated from the charges for the tangible personal property or digital property on the
9 customer's invoice.

10 (a) Any transfer of tangible personal property or digital property for a consideration, other than the
11 master advertisement and the items described in Section 2 of this administrative regulation used in the
12 creation of the master advertisement, to a client or a third party on behalf of a client shall be considered a
13 retail sale of tangible personal property or digital property subject to sales tax.

14 (b) Receipts from agency fees, service charges, or commissions exclusively for advertising services
15 shall not be subject to sales tax, including charges for placing advertisements in print, broadcast, or other
16 media.

17 (c) The amount separately stated for the tangible personal property or digital property shall not be less
18 than the fair market value of similar property sold in a similar transaction not involving the provision of
19 advertising services.

20 (2) If an advertising agency contracts with a client to provide both advertising services and the sale of
21 tangible personal property or digital property and does not clearly delineate the charges on the customer's
22 invoice, the total billing amount is subject to tax.

23 Section 5. Forms. The forms listed herein may be inspected, copied, or obtained, subject to applicable
24 copyright law, at:

25 (1) The Kentucky Department of Revenue, 501 High Street, Frankfort, Kentucky 40620;

26 (2) At a Kentucky Taxpayer Service Center during business hours; or

1 (3) On the department website at <http://revenue.ky.gov>.

2 ~~[Incorporation by Reference. (1) The following material is incorporated by reference:~~

3 ~~—(a) Revenue Form 10A100 "Kentucky Tax Registration Application For Withholding, Corporation,~~

4 ~~Sales and Use Taxes, and Motor Vehicle Tire Fee", October 2002;~~

5 ~~—(b) Revenue Form 51A102 "Sales and Use Tax Return", July 2003;~~

6 ~~—(c) Revenue Form 51A105 "Resale Certificate", September 1990; and~~

7 ~~—(d) "Uniform Sales and Use Tax Certificate—Multijurisdictional", July 2000.~~

8 ~~—(2) These material may be inspected, copied, or obtained, subject to applicable copyright law, at the~~

9 ~~Kentucky Revenue Cabinet, 200 Fair Oaks Lane, Frankfort, Kentucky 40601, or at any Kentucky Revenue~~

10 ~~Cabinet Taxpayer Service Center, Monday through Friday, 8 a.m. to 4:30 p.m.]~~

103 KAR 26:120

APPROVED BY AGENCY:

Daniel P. Bork
DANIEL P. BORK, COMMISSIONER
Department of Revenue
Finance and Administration Cabinet

Oct. 6, 2017
Date

PUBLIC HEARING AND PUBLIC COMMENT PERIOD

A public hearing on this administrative regulation shall be held on November 28, 2017, at 1:00 p.m. in Room 11A, Department of Revenue, 501 High Street, Frankfort KY 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through November 30, 2017. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Lisa Swiger, Tax Policy Research Consultant II, Department of Revenue, 501 High Street, Station 1, Frankfort, Kentucky, 40601, (502) 564-9526 (telephone), (502) 564-3874 (fax), Lisa.Swiger@ky.gov(email).

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 103 KAR 26:120

Contact Person: Lisa Swiger

Phone Number: (502) 782-5705

Email: Lisa.Swiger@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation is an amendment that updates regulatory language to conform to recent statutory language revisions.

(b) The necessity of this administrative regulation: The amendment is necessary to remove outdated language and information currently contained in the regulation.

(c) How this administrative regulation conforms to the content of the authorizing statutes: The proposed amendment updates regulatory language to conform with KRS 131.130 and KRS 131.131.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: The proposed amendment updates regulatory language to address outdated information currently contained in the regulation.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The current version of 103 KAR 26:120 contains repealed statutory references, outdated and unnecessary forms dates and prior Department of Revenue address and contact information. "Revenue Cabinet" is updated to read "Department of Revenue" and "digital property" is input into the verbiage as appropriate pursuant to KRS 139.200. The Streamline Sales Tax is also listed as an option for the exemption certificate. The proposed amendment updates regulatory language to address these issues.

(b) The necessity of the amendment to this administrative regulation: The amendment is necessary to update outdated language and information currently contained in the regulation. Repealed statutory references are removed and replaced with the updated statutory reference, outdated and unnecessary forms dates are removed and DOR contact and address information is updated. "Revenue Cabinet" is updated to read "Department of Revenue" and "digital property" is input into the verbiage as appropriate pursuant to KRS 139.200. The Streamline Sales Tax is also listed as an option for the exemption certificate.

(c) How the amendment conforms to the content of the authorizing statutes: The proposed amendment updates regulatory language to conform with KRS 131.130 and KRS 131.131.

(d) How the amendment will assist in the effective administration of the statutes: The proposed amendment updates regulatory language to address outdated information currently contained in the regulation.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: All individuals, businesses, organizations, or state and local governments that access the amended regulation.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No actions are necessary to comply with the amendment.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no cost to comply with the amended regulation.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Anyone who accesses the amended regulation will benefit from the updated information contained therein.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: There is no cost to implement the proposed amendment.

(b) On a continuing basis: There is no cost to implement the proposed amendment.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: There is no additional cost to implement and enforce the proposed amendment.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: There is no additional cost to implement and enforce the proposed amendment.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No fees are directly or indirectly established or increased by the proposed amendment.

(9) TIERING: Is tiering applied? (Explain why or why not) : Tiering is not applicable as the proposed amended regulation applies equally to all those affected by it.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 103 KAR 26:120

Contact Person: Lisa Swiger

Phone Number: (502) 564-9526

Email: Lisa.Swiger@ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Finance and Administration Cabinet, Department of Revenue.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 131.130 and KRS 131.131

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.

(c) How much will it cost to administer this program for the first year? No additional costs will be incurred in the first year of this regulation being in effect.

(d) How much will it cost to administer this program for subsequent years? No additional costs will be incurred in subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: